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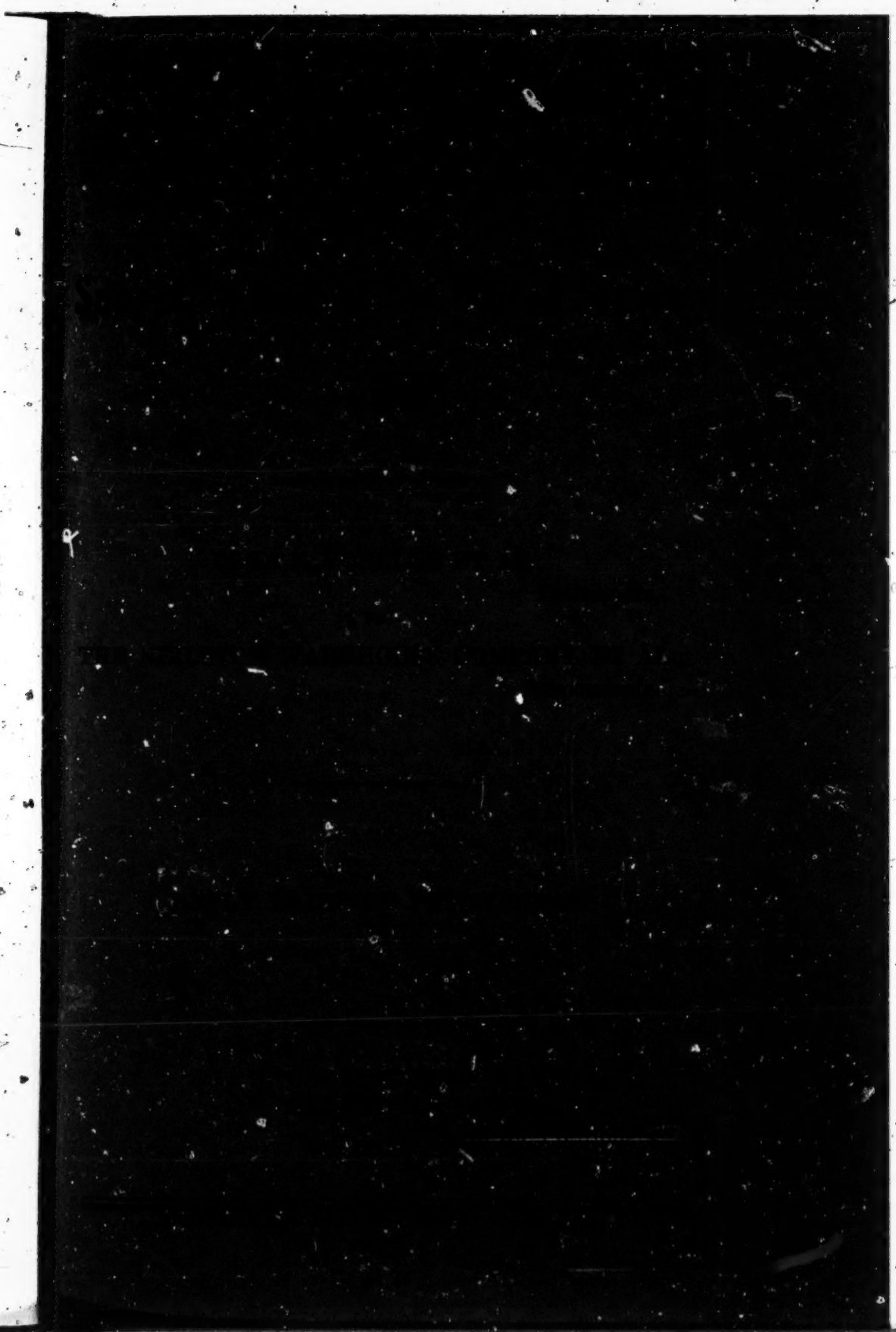

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INDEX.

I. Correction of respondents' statement of facts. 2

II. Is this a controversy between two classes of stockholders? 4

III. Was the corporation in liquidation on June 2, 1936? 5

IV. Is this a matter of local law, or does it present a federal question? 6

V. Does the Ohio statute afford a fair opportunity to avoid the so-called conclusive presumption? 8

VI. Have the rights of majority shareholders as such been violated? 11

Cases Cited.

12 C. J., p. 1301 6

Geiger v. American Seeding Machine Co., 124 O. S., 222 4

Glen v. Garth, 147 U. S., 360, 37 L. Ed., 203 8

Grand Gulf v. Marshall, 52 U. S., 12, 13 L. Ed., 938 .. 8

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IN THE

Supreme Court of the United States

No. 1035.

OLGA E. VOELLER ET AL.,

Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY ET AL.,

Respondents.

REPLY BRIEF OF PETITIONERS.

It is to be feared that the elaborate briefs already filed in this case will have the effect of making a very simple matter have the appearance of a difficult and complex problem. As a matter of fact it is a simple matter. The ultimate question is as to whether the requirement in the Ohio appraisal statute that the corporation shall make a counter offer within 10 days after the dissenting stockholders have made their demand is sufficiently burdensome to constitute the violation of due process. Or to put it differently whether the simple expedient of making a counter offer which if it had been made in this case would have obviated this controversy, is the denial of a fair opportunity to the corporation to obviate the so-called conclusive presumption which according to the

technical language of the statute forecloses final inquiry as to value.

There is of course the further question which has been injected into this case as to whether the stockholders have had a **fair opportunity** and whether the stockholders have rights separate and distinct from the corporation itself in proceeding under these appraisal statutes. This subject will be dealt with later.

I. Correction of Respondents' Statement of Facts.

The brief of respondents contains an elaborate statement of facts which are for the most part accurate but we are compelled to take violent issue upon certain statements.

It is our contention that the real value of the stock is not an issue in this case. But inasmuch as it is sought by respondents to make value an issue we desire to correct an impression which might be created by reading the fourth and fifth pages of respondents' brief. The effort to make value an issue is neither more nor less than an assault upon the emotions of this court and to arouse sympathy for the majority stockholders who have imposed their will upon the dissenting minority. It is stated at page 5 of respondents' brief that the total of all claims of the minority stockholders amounts to $72,160.00. This figure represents the total claims of all dissenting stockholders who originally made demands within the 20-day period. Only a limited number pursued their claims to the point of litigation. The total amount necessary to satisfy the claims of petitioners in this action is $25,280.00. It may be that if all of the dissenting stockholders had brought action that it would have had the

effect of reducing the amount which would be received by respondents to $13.00 per share but inasmuch as it takes only $25,280.00 to satisfy the claims of the minority stockholders the reduction would be less than $4.00 per share, instead of $12.00 per share as claimed by respondents.

It must constantly be kept in mind that the majority stockholders have imposed their will upon the minority in forcing a sale of assets at a ridiculous figure. The purpose of the majority stockholders was not developed in the evidence and we will therefore omit any discussion of the reasons. It does appear in the record that this corporation was not a failing concern or even a waning enterprise. The company was in fact paying dividends and at the same time it was applying $500.00 monthly upon the principal of mortgage indebtedness. If the majority stockholders found it to their personal advantage to force a ruinous sale upon the minority stockholders, surely there is no place for asking this court to waste sympathy upon the majority.

The minority stockholders demanded $100.00 per share which we confidently assert was its real value. The corporate books which are made up for the purposes of taxation, are usually on a basis of value which is much less than the real value, and in fact this company, according to its books, had assets making its stock more than $60.00 per share. (Record, p. 33 and Exhibit 1, page 73.)

II. Is This a Controversy Between Two Classes of Stockholders?

Another inaccuracy in the statement is the endeavor to create the impression that this is a controversy between two classes of stockholders. As a part of this effort it is stated at page 2 of respondents' brief, "The company was not operating any business. It was simply endeavoring to liquidate as soon as it could sell the remainder of its property."

The brief contains its own refutation. The meeting of stockholders to authorize the sale was held on June 2, 1936 (See page 3 of respondents' brief). Thereafter the company continued business until August 13, 1936, at which time the directors authorized dissolution proceedings (See page 4 of respondents' brief). This meeting of the directors was 10 weeks later than the stockholders' meeting and in the meantime the corporation continued its business.

The evident purpose of this false impression is to make it appear that there were two classes of stockholders which would give application to the case of Geiger v. American Seeding Machine Co., 124 O. S., 222. The purpose in trying to apply the Geiger case to this controversy is apparent. The Geiger case was a case between preferred and common stockholders after sale of assets and the controversy arose during the process of distribution. In the instant case there could be only one class of stockholders because there were no preferred stockholders in The Neilston Warehouse Company.

III. Was the Corporation in Liquidation on June 2, 1936?

Note that the corporation did not vote to liquidate. It could have done so under Section 8623-79 "when substantially all the assets have been sold."

The only question considered, or which the corporation submitted for consideration at the shareholders' meeting on June 2, 1936, was a sale of certain assets. (Record, page 1.)

It was under Section 8623-79 after the sale of substantially all assets, that the board of directors resolved on August 13, 1936, to liquidate and named a liquidator.

The corporation through its board of directors had no such authority until after such sale had been authorized on June 2, 1936.

Petitioners' cause of action arose long prior to such resolution to liquidate.

The liquidation proceedings were not instituted until August 13, 1936.

Mere discussion of the possibility of a liquidation at a meeting of the board of directors on June 16, 1936, did not constitute liquidation, or even an initiation of liquidation proceedings—but even if it had, such discussion took place two weeks after the action taken by the majority shareholders for sale of substantially all assets.

We stress these facts because of the emphasis placed by the respondents upon the **false** claim that the corporation was in the process of liquidation at the time of the shareholders' action on June 2, 1936.

The corporation was not only **not** in liquidation at the time of the meeting on June 2, 1936, when the majority shareholders voted to authorize the sale of certain assets,

but **no action** was then taken or considered by the shareholders toward authorizing the corporation or the board of directors to "divide or distribute such consideration among the shareholders", which authority was necessary under General Code 8623-65 before the board of directors might make any such division or distribution.

IV. Is this a Matter of Local Law or Does It Present a Federal Question?

In the brief of counsel for respondents at pages seven, eight and nine, there is a discussion of the proposition that this controversy involves only local law concerning which the Supreme Court of the United States will follow the decision of the state court.

It would seem that little notice should be given to this claim, but since it is seriously urged, it will be seriously answered. This cause has been admitted to this court upon allowance of a petition for certiorari. It will be assumed that in granting the motion, the members of this court had not failed to observe the character of the judgment of the Supreme Court of Ohio, and the points decided by that court. If the decision of the Ohio Supreme Court involved only an interpretation of the Ohio statute and if the validity of the statute were not also involved, we would not claim that this court would exercise jurisdiction. It is our contention that the decision of the Ohio Supreme Court did not involve **construction** of a statute. It involved purely and simply the **validity** of the Ohio statute.

Construction in 12 C. J., p. 1301, is defined as:

> "The process, or the art, of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions in a statute, etc."

Upon this point we quote the admission found on page 19 of respondents' brief:

> "There is no ambiguity in the statute. Hence no construction is required and that principle is not involved. The question is purely and simply one of constitutionality with the attendant requirement that every reasonable presumption in favor of constitutionality will be indulged."

We have examined all of the cases cited on pages 7, 8 and 9 and we find not a single case where this court has refused jurisdiction where the state court has based its decision upon the validity or invalidity of a state statute. It is true that in some of those cases the state court had in fact resorted to interpretation. In those cases this court held that in considering the question of validity under the federal Constitution this court would give the state statute the meaning which the state court had declared. In those cases this court did in fact entertain jurisdiction and did consider and decide the question of constitutionality after giving to the statute the meaning as declared by the state court in each case.

There was neither discussion nor decision of meaning of statute or legislative intent, in the instant case. The decision of the state court was that the statute according to its plain meaning was a violation of due process. If such a decision involving as it does purely a question of constitutionality as measured by the federal Constitution is binding upon this court, it is difficult to conceive of an appeal from a state court to this court, in any case.

We must, therefore, decline to enter upon a discussion of those cases. We do, however, point out that the quotations found on page 8 and at the top of page 9, of respondents' brief fully bear out our contention, namely,

that while the state court may properly determine the meaning of the statute, it still remains for this court to determine whether the statute as construed is constitutional.

Opposing counsel have failed to discern the distinction between construction and validity. Upon this point we quote from the case of Glen v. Garth, 147 U. S., 360, 37 L. Ed., 203:

> "This court has no jurisdiction to review the decision of a state court upon the ground that in such decision error intervened in the construction of a statute in another state; there is a distinction between the construction of a statute and the validity of such statute."

That distinction is elaborated upon in the opinion of Chief Justice Fuller in which he cites early cases and more particularly an opinion of Chief Justice Taney in the case of Grand Gulf, etc., v. Marshall, 52 U. S., 12, 13 L. Ed., 938.

We heartily agree with the conclusion reached by respondents as declared at page 9 of their brief. "We recognize, of course, that the ultimate question of due process is for this court."

V. Does the Ohio Statute Afford a Fair Opportunity to Avoid the So-called Conclusive Presumption?

At pages 10 and 11 of respondents' brief this subject is discussed and numerous former decisions of this court are cited. We shall not quote or discuss any of those cases. It is sufficient to say that some of those same cases are cited and discussed in petitioners' opening brief at pages 46 and 47, and that we have carefully examined all cases cited by respondents and we find that in every

one of those cases the decision turned upon the one question as to whether or not a **fair opportunity** was afforded.

And in none of those cases was an opportunity afforded **either before or during the proceeding to repel, avoid or escape the objectionable presumption.**

Both in the argument and in the conclusion of petitioners' opening brief it is pointed out that there were at least five distinct ways, even after the minority shareholders had made their demands, whereby the corporation or the majority shareholders could have availed themselves of legal remedies, or complied with conditions precedent, thereby avoiding the conclusive presumption, to wit:

(a) The corporation could have offered "an amount" within 10 days under the fourth paragraph of 8623-72.

(b) The corporation could have brought a suit within 6 months under the sixth paragraph of 8623-72.

(c) The majority shareholders or any one of them could have done likewise in the name of the corporation upon demand of and refusal by the corporation under the sixth paragraph of 8623-72.

(d) The corporation for any reason could have abandoned the purpose to sell under the third paragraph of 8623-72.

(e) The majority shareholders could have revoked the authority to sell under the third paragraph of 8623-72.

It becomes therefore a question as to whether any one of the simple expedients in the hands of the corporation or the majority shareholders does afford a fair opportunity to obviate the so-called conclusive presumption. And will the corporation be heard to complain after hav-

ing deliberately refused to avail itself of this simple expedient? Can it be said that in view of the facility with which the corporation as well as the majority shareholders could obviate the presumption that the statute operates as an arbitrary denial of a fair opportunity to repel the presumption?

As bearing upon the neglect of the corporation to make a counter offer we call attention to the reply which the corporation made to the petitioners' demands:

> "Your demand for payment is refused. The purpose for which the Neilston Warehouse Company was incorporated has been abandoned." (Record, page 62, also Exhibit 8.)

We think that when the corporation at a later date than June 2, 1936, did sell the balance of its property and did resolve to liquidate, it took such action for one purpose only, and that was to attempt to circumvent and defeat these plaintiffs in the prosecution of their respective claims.

We believe when the court considers the contents of the above quoted letter in reply to written demands, the force of our assertion will be apparent.

At that time no action had been taken toward liquidation. That action was not taken until August 13, 1936. The strategy conceived by the corporation is too apparent. It was sought by wrong interpretation of the phrase "abandon its purpose", contained in paragraph 3 of Section 8623-72, and by construing the phrase to mean abandonment of the purpose for which the company was incorporated, to make the dissenting shareholders believe that by the simple expedient of abandoning the corporate purpose they had lost their statutory rights as dissenters. The dissenting shareholders at this juncture sought legal advice and learned that the abandonment referred to the proposed sale.

VI. Have the Rights of Majority Shareholders as Such Been Violated?

This subject occupies respondents' brief from pages 12 to 19 inclusive. We have dealt with this subject in our opening brief at pages 30 to 37 inclusive, wherein we point out that notice to the corporation is notice to majority shareholders and that majority shareholders or any one of them could have acted in the name of the corporation.

We do not feel justified in continuing that discussion or in answering that discussion in respondents' brief further than to say that the decision of the Ohio Supreme Court is based upon the claim that the controversy was between two classes of shareholders and that the brief of opposing counsel naturally adopts the same view.

The obvious answer is that The Neilston Warehouse Company had only one class of shareholders and it does not create two classes of stockholders because there was a difference of opinion among the shareholders of the same class on the subject of making a sale of substantially all assets.

This being so the cases cited in respondents' brief have no application.

If each such individual is entitled to notice of the demands of dissenting shareholders in case of sale of substantially all assets, as is claimed by the respondents in this case, then it follows that each such individual majority shareholder would be entitled to individual and separate notices in event:

1. The corporation has voted to merely lease or exchange substantially all assets under General Code Sections 8623-65 and 8623-72.

2. When the corporation has merely amended its articles of incorporation under Sections 8623-14, 8623-15 and 8623-72.

3. When a consolidation or reorganization has been authorized under Section 8623-72.

4. When a merger or consolidation has been effected under Sections 8623-67 and 8623-72, or

5. When a reorganization has been effected under General Code Sections 8623-15a and 8623-72.

At page 18 of respondents' brief it is conceded that where irreparable injury is threatened to a corporation and it refuses to act upon demand, a stockholder may bring an action in the name of a corporation to avoid this conceded proposition of law. It is said that it only applies where the shareholders have knowledge of the threatened damage.

Surely the majority stockholders having participated in the meeting and having imposed their will upon the minority must be held to have knowledge of the subsequent demand of the minority and the failure and refusal of the corporation to make a counter offer. This was pointed out with emphasis in the opinion of Judge Geiger in his opinion in the Court of Appeals in this case.

CONCLUSION.

In conclusion we call attention to an article written by Professor Norman D. Lattin of Ohio State University, School of Law, and an author of distinction on corporate subjects, published in the Michigan Law Review in June, 1940, on the subject "Reappraisal of Appraisal Statutes", copies of which have been heretofore furnished to the members of this court. We particularly refer to the discussion in the article of The Neilston Warehouse Com-

pany case beginning at page 1173 and ending at page 1181. We also again call attention to the dissenting opinions of Judge Hart and Judge Myers of the Ohio Supreme Court and the quotation from the opinion of Judge Myers found at pages 42 and 43 of our opening brief. The full opinion of these two judges is found at pages 82, 83 and 84 of the transcript of record.

Respectfully submitted,

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